IN THE

Supreme Court of the United States.

THE OFFICERS AND ENLISTED MEN OF THE U. S. S. "NEW YORK," "INDIANA," AND "WILMINGTON," APPELLANTS, *v.* THE OFFICERS AND ENLISTED MEN OF THE U. S. S. "MANGROVE."	*No.* 445.

Reply Brief for the Appellants on the Motions for Leave to take Further Proof.

The brief for the appellees, in opposition to these motions, contains certain allegations, which are intended to show that the appellants were guilty of laches in failing to adduce all of their proofs in the prize court. We wish to correct certain misstatements of fact and show that the appellants have been as vigilant as the circumstances permitted.

The affidavits and briefs for the appellants submitted in support of these motions, among other things, show: that after the capture of the "*Panama*," throughout the period during which the proofs were taken by prize commissioners and until the end of the war between the United

States and Spain, the duties assigned to the U. S. F. S. "*New York*" and U. S. S. "*Indiana*" and "*Wilmington*," prevented them from calling at Key West, except on one or two occasions when they remained only long enough to obtain coal and other necessary supplies, and by reason of that fact, and because the officers and men of these three vessels were occupied continuously by duties of immediate importance, during their calls at Key West, and at all other times, they did not have an adequate opportunity to give depositions in support of their claims for a share of the prize money arising from the capture of the "*Panama*." It is stated, likewise, that neither the appellants nor their representatives had an adequate opportunity to inspect the record in the cause prior to the hearing in the prize court for purposes of distribution, and had not adequate notice of that hearing.

In the brief for the appellees, submitted by Messrs. Herbert & Micou, an attempt is made to show that the appellants, or their counsel, had ample opportunity to offer further proofs and to be heard in the cause, and actually were heard.

Inasmuch as the affidavits and fragments of correspondence appended to the appellees' brief might lead to a false impression, we feel constrained to describe at length the successive steps taken in the case and the transactions of all parties thereto.

By decree of the prize court, the "*Panama*" was condemned. On the appeal of the claimant, the decree of condemnation was affirmed by this court on February 26, 1900. The record on that appeal did not contain the claims for prize money presented by the "*New York*," "*Indiana*," "*Wilmington*," and "*Mangrove*," or the evidence in support of the claims, which now appears on pages 19 to 70 of the present record. Prior to the

affirmance of the decree of condemnation, no question affecting the distribution of prize money had been or could have been raised. After the decision was rendered by this court, counsel for the appellants endeavored to learn when the case of the "*Panama*" and other cases in which decrees of condemnation had been entered, would be reached for hearing on the question of distribution. Correspondence relating to this subject was carried on with the clerk of the District Court for the Southern District of Florida and the United States District Attorney. It developed that no regular calendar was kept of the pending prize cases, and that they were called up from time to time on motion or pursuant to agreements of counsel. All letters relating to the case of the "*Panama*," other than the two appended to the appellees' brief, are set out in the affidavit of James H. Hayden, hereunto annexed. From the letters and affidavit it appears that on April 23, 1900, counsel for the "*Mangrove*" directed a notice to counsel for the "*New York*," "*Indiana*" and "*Wilmington*," saying that he proposed to call up the case for distribution on May 8, 1900. The notice was received on April 28th. On account of professional engagements in Washington, and with the hope of avoiding repeated trips to Florida, counsel for the "*New York*" sought to have the proposed hearing postponed for a short time in order that arrangements might be made to call up successively for hearing the cases of the "*Panama*," "*Pedro*," "*Guido*," "*Paquette Habana*," and "*Benito Estenger*," all of which were then pending in the District Court for the Southern District of Florida awaiting either decrees of distribution or decrees fixing the responsibility for costs and damages. The postponement desired was not granted. On May 8, 1900, the case of the "*Panama*" was argued and submitted by

the United States District Attorney and counsel for the "*Mangrove.*" Counsel for the "*New York*," *Indiana*," and "*Wilmington*," were allowed five days in which to file briefs. Being unable to examine the record in that short period they were obliged to rely upon the depositions of the captured crew taken *in preparatorio*, and such information as they were able to gain from records of the Navy Department. On or about June 7, 1900, James H. Hayden, of counsel for the captors in the cases of the "*Pedro*," "*Guido*," "*Carlos F. Roses*," "*Paquette Habana*," and "*Benito Estenger*," appeared before the district court and was heard therein. In an informal interview with the judge of the district court, which did not occur in court, the latter stated that he had under consideration the case of the "*Panama*," which had been argued on the 8th of May, and expected to render his decision within a few days. No discussion of the case ensued, and we submit that under the circumstances any argument would have been ill-timed and improper.

We submit that because of the informal manner in which this and other prize cases were conducted and called up for hearing in the prize court the appellants are not chargeable with laches, and that Messrs. Herbert & Micou, for the appellees, have shown no cause why the appellants should not be given an opportunity to clear away from the record the uncertainties caused by the contradictory evidence given by witnesses, whose standing in the United States Navy entitles their sworn statements to consideration. The motions ask that leave to take further proof be granted to *all* parties. If allowed it could not work injustice to anyone.

JOS. K. McCAMMON,
JAMES H. HAYDEN,
Of Counsel for the Officers and
Enlisted Men of the U. S. F. S. "New York."

DISTRICT OF COLUMBIA, *ss:*

James H. Hayden, being duly sworn, deposes and says: That he is of counsel for the appellants in the above-entitled cause; that the letters hereunto annexed were directed by him, in the name of the firm of McCammon & Hayden, of which he is a member, to the Hon. J. N. Stripling, the United States District Attorney for the Southern District of Florida, E. O. Locke, Esq., Clerk of the District Court of the United States for the Southern District of Florida, and Jefferson B. Browne, Esq., of counsel for the "*Mangrove*," or were received by the affiant's firm from one of the said persons; that the facts stated in the said letters of the firm of McCammon & Hayden are true; that the notice of the said Browne stating that he proposed to call up the case of the "*Panama*" for purposes of distribution was received on April 28, 1900; that by reason of professional engagements in Washington, D. C., the affiant who had charge of the case was unable to be present at the hearing of the same for purposes of distribution which was held in Jacksonville on May 8, 1900, and was never heard in the said cause and never argued the case before or discussed the same with the Hon. James W. Locke, Judge of the District Court of the United States for the Southern District of Florida.

JAMES H. HAYDEN.

Subscribed and sworn to before me this 3d day of April, 1901.

[SEAL.]

PAUL E. SLEMAN,
Notary Public.

CORRESPONDENCE.

APRIL 30, 1900.

DEAR SIR:

We have received a notice from Jefferson B. Browne, Esq., of Key West, in which he advises us that he represents the U. S. S. "*Mangrove*" in the case of the "*Panama*" (Prize), and that he will call up this case for distribution on May 8th. To-day we have seen Capt. Chadwick, late commanding officer of the "*New York*." He advises us that at or about the time of the capture he prepared a claim on behalf of his vessel for a share of the prize money, in which he mentioned the fact that the U. S. "*Indiana*" and "*Mangrove*" were also entitled to a share therein. He does not remember, and has no record to show, whether this claim was forwarded to the Navy Department, the Auditor, or to the Prize Commissioners. Can you advise us what claims or proofs affecting the question of distribution there are on file in the case?

We may be obliged to ask Mr. Browne to postpone the hearing in order that proofs may be made on behalf of the "*New York*" and "*Indiana*." If there is nothing of this kind on file except the petition of Capt. Chadwick (March 23) will you kindly advise us by telegram at our expense.

Very truly yours,

McCAMMON & HAYDEN.

E. O. LOCKE, Esq.,
Clerk of Dist. Court, U. S. Jacksonville, Fla.

THE WESTERN UNION TELEGRAPH COMPANY.

Received at Wyatt Bldg., 14th & F Streets, Wash., D. C., May 2, 1900. Dated Jacksonville, Fla.

To McCammon & Hayden, 1420 F Street, Wash., D. C.

Depositions were filed in 1898 in case "*Panama*" by "*Mangrove*," "*Wilmington*," "*Indiana*," and "*New York*."

E. O. LOCKE,
Clerk Court.

MAY 3, 1900.

DEAR SIR:

Important engagements here will prevent our going to Jacksonville before the 8th instant, and if the hearing were to be held on that day, we should have no opportunity to examine the depositions in behalf of the "*Mangrove*," "*New York*," "*Indiana*," and "*Wilmington*," which are on file in the case of the "*Panama*."

We therefore ask you to agree to a postponement of say from ten days to two weeks. You will appreciate that the trip from Washington to Florida is too long a one to be repeated frequently. We are endeavoring to arrange to have several other cases heard about the 20th of May. It would be a great convenience if that of the "*Panama*" could be heard at the same time.

We trust that this change would not cause you inconvenience, and if you can grant it shall be greatly obliged to you.

Very truly yours,

McCAMMON & HAYDEN.

To JEFFERSON B. BROWNE, Esq.,
Counsellor at Law,
Key West, Fla.

MAY 3, 1900.

DEAR SIR:

Engagements in Washington make it practically impossible for us to attend the proposed hearing in the "*Panama*" on May 8th.

We hoped, through our clients, to get copies or at least the substance of depositions given by them, and thus be able to submit the case in brief. This we have found impossible, and hence are anxious to have the hearing in the "*Panama*" postponed until the cases of the cargoes of the "*Pedro*" and "*Guido*" can be heard.

We have written to the Honorable J. N. Stripling with regard to the latter cases, and hope that they may be set for some time about the 20th instant. We have written to Jefferson B. Browne, Esq., counsel for the "*Mangrove*" in the "*Panama*," asking him to grant a postponement of from ten days to two weeks. To this request we hope he will accede, and trust that the court can arrange to hear the cases about the same time, so that we may dispose of them without making two trips to Florida.

Very truly yours,

McCAMMON & HAYDEN.

To E. O. LOCKE, Esq.,
Clerk District Court of the United States,
Southern District of Florida,
Jacksonville, Florida.

EUGENE O. LOCKE,
Clerk U. S. Circuit and District
Court, Southern District of Florida.

JACKSONVILLE, FLA., *May 5th*, 1900.

Messrs. McCAMMON & HAYDEN,
Washington, D. C.

GENTLEMEN: I am in receipt of your letter of the 3d,

speaking of postponement of hearing on question of distribution in case "*Panama*," and I am at a loss to understand what you mean when you speak of postponing same until "the cases of the cargoes of the '*Pedro*' and '*Guido*' can be heard."

There are no such cargo cases pending; they have all been heard and determined.

I have also received the testimony of Ludlow & Rogers, taken in case of "*Ambrosio Bolivar*," Ludlow, McRea, and Garst, in case of "*Guido*," and Chadwick in "*Carlos F. Roses*," taken in Washington.

Respectfully,

E. O. LOCKE,
Clerk.

MAY, 5, 1900.

DEAR SIR:

Some days ago we received a notice from Jefferson B. Browne, Esq., representing the officers and enlisted men of the U. S. S. "*Mangrove*," by which he announced that he would call up the case of the "*Panama*" for distribution on the 8th instant. We find that it will not be possible for us to be present in Jacksonville at that time, and have written to Mr. Brown asking him to have the hearing postponed. Inasmuch as the "*Pedro*," "*Guido*," and other cases are likely to be called up before long, we hope that the "*Panama*" may be heard at the same time. Possibly the court will consider it desirable to take up the pending prize cases and dispose of them as far as possible, one after another. This, you will appreciate, would be a great accommodation to counsel who are interested in a number of cases and who reside at considerable distance from Jacksonville.

We gather from Mr. Browne's letter that he intends to argue that the "*Panama*" was captured by the "*Man-*

grove" alone and constituted a superior force. He suggests that, although the "*New York*" and "*Indiana*" may have been within signal distance of the "*Mangrove*" when the capture was made, and hence entitled to share in the prize money, the fact that they did not actually participate in the capture should exclude them from consideration in determining the strength of the capturing force. While we should be very glad to have all of the net proceeds distributed among the captors, we think that the law on this subject was conclusively settled in the case of the "*Atlanta*" (3 Wall., pp. 425–434). The "*New York*," "*Indiana*," and "*Wilmington*" having been within signal distance of the "*Mangrove*," are entitled to share in the prize and must be treated as part of the capturing force.

If the hearing cannot be postponed, will you kindly ask the court to grant us leave to file a brief in behalf of the "*New York*" within say ten days or two weeks?

Very truly yours,

McCAMMON & HAYDEN.

To Hon. J. N. STRIPLING,
U. S. District Attorney,
Jacksonville, Florida.

WESTERN UNION TELEGRAPH COMPANY.

Received at Wyatt Bldg., 14th & F Streets, Washington, D. C. Dated Jacksonville, Fla., May 7, 1900.

To McCammon & Hayden, Washington, D. C.

Court will give you five days to file brief in "*Panama*" case.

STRIPLING,
U. S. Atty.

MAY 9, 1900.

DEAR SIR:

We send you herewith our brief in behalf of the officers and enlisted men of the U. S. S. "*New York*," in the matter of the distribution of prize money in the case of the "*Panama*." The court granted us leave to file this brief within five days of the date of hearing (8th instant). Kindly file the brief and present it to the court.

We have sent a copy to Jefferson B. Browne, Esq., counsel for the "*Mangrove*."

Very truly yours,

McCAMMON & HAYDEN.

To E. O. LOCKE, Esq.,
Clerk District Court for the
Southern District of Florida,
Jacksonville, Florida.

MAY 9, 1900.

DEAR SIR:

Please accept our thanks for your letter of the 7th instant with regard to the "*Panama*."

We agree with you that there should not be the slightest doubt that the "*New York*," "*Indiana*," "*Mangrove*," and "*Wilmington*," will be awarded a moiety of the prize fund, but having prepared a brief send it in for what it is worth. Our work was done at some disadvantage, because we only had the logs of the vessels and official correspondence relating to the capture. We understand that depositions on behalf of each of the vessels were taken before the prize commissioners, and are of record in the case.

We were surprised to learn from E. O. Locke, Esq, clerk

of your court, that the cargo claims in the "*Pedro*" and "*Guido*" had all been disposed of. We understood that the pendency of some of these claims occasioned the delay in making distribution. Prior to receiving Mr. Locke's letter our information was obtained through the Navy Department, where we consulted your last report. If all of the cargo claims have not been disposed of, will you kindly indicate a time when it will be convenient for the court to hear them. We should like to move for condemnation and follow this by motion for distribution.

Very truly yours,

McCAMMON & HAYDEN.

Hon. J. N. STRIPLING,
U. S. District Attorney,
Jacksonville, Florida.

MAY 9, 1901.

DEAR SIR:

We send you herewith a brief in behalf of the "*New York*," in the case of the "*Panama*," which we have presented to the court pursuant to leave granted.

You will note that we do little more than invite the court's attention to two authorities, because our knowledge of the facts was obtained wholly from the log books of the naval vessels concerned and official records. We had no opportunity to examine the depositions filed on behalf of the "*New York*," "*Indiana*," "*Wilmington*," and "*Mangrove*."

Very truly yours,

McCAMMON & HAYDEN.

To JEFFERSON B. BROWNE, Esq.,
Key West, Fla.

MAY 10, 1900

DEAR SIR: We learned for the first time this afternoon that a report had been filed by commissioners appointed in the case of the "*Panama*," wherein they found that the "*Mangrove*" was the sole captor. Herewith we send you an objection and protest against this finding, made on behalf of the "*New York*," "*Indiana*," and "*Wilmington*." Please see that this is filed and presented to Judge Locke, along with the other papers in the case.

Yours, very truly,
McCAMMON & HAYDEN.

E. O. LOCKE, Esq.,
Clerk, U. S. District Court,
Jacksonville, Florida.

(Postal card.)

"*Panama.*"

JACKSONVILLE, FLA., *May* 12, 1900.

Your objections to report of Prize Commissioners have been filed and handed to the judge.

Yours truly,
E. O. LOCKE,
Clerk, U. S. District Court,
Southern District of Florida.

McCAMMON & HAYDEN,
1420 *F Street, Washington, D. C.*

JACKSONVILLE, FLA., *May* 11, 1900.

Messrs. MCCAMMON & HAYDEN,
Washington, D. C.

GENTLEMEN:

Yours of the 9th inst., enclosing your brief in the matter of the U. S. S. *New York*, has been handed to the judge as requested.

Very truly yours,

E. O. LOCKE,
Clerk.

Dictated.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

THE UNITED STATES, APPELLANT,
v.
THE OFFICERS AND CREW OF THE U. S. S. "Mangrove." } No. 380.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

SUGGESTION ON BEHALF OF THE UNITED STATES UPON MOTION FOR LEAVE TO TAKE FURTHER PROOF.

The United States might well succeed in reversing the decree below on the present record, even if the appellants in No. 433, in which a similar motion is filed upon the same record, should not succeed in their claim to share in the distribution. That is to say, the United States believe that even if the *Mangrove* were the sole capturing vessel, the prize was of inferior force. On the other hand, it is obvious that if the *Indiana*, the *New York*, and the *Wilmington* were within signal distance at the time of capture, and are entitled to share in the proceeds of the prize, the prize was manifestly of inferior force. Although thus far interested with the contesting captors, the United States disclaim any

bias relative to the competing rights. Nevertheless, it seems proper to suggest to the court that at this stage of a prize cause, after the controversy between the claimants and the captors has been settled, it is especially fitting that further proof should be allowed when any fair doubt arises respecting distribution. There is not in this posture of affairs so much reason for scrutiny of motives or suspicion of fraud as when the question is still prize or no prize. That main inquiry, and not the subordinate inquiry regarding distribution, has chiefly dictated the rule that great caution should be observed in allowing an order for further proof because of the temptation to fraud or perjury. In the peculiar circumstances of this case the interrogatories were manifestly inappropriate and elicited little information pertinent to the present subject. There seems no doubt that the delay in moving for further evidence is fully explained and is not open to the charge of negligence.

The purpose and desire of the court in any prize case is to know all of the circumstances so that the real facts and the actual situation of the parties interested may be fully cleared up. From this point of view the interests of justice often require further proof, and when this is the case the court will grant the necessary opportunity. The authorities cited on behalf of the contesting naval captors make it clear, I think, that this application is justified upon principle and is within the rule of instances which are not precise precedents, but illustrate the reason or guide just suggested. Especially do the two cases of the *Frances* (8 Cranch, 348, id.,

354) show that this court's desire is to ascertain the real facts and all the facts, and that an order for further proof will be given with that end in view, and even a second order where the first order has not produced the necessary amount or kind of evidence.

In the case of the *Lydiahead* (2 Acton, 133) further proof was allowed with respect to points about which the court was evidently not satisfied under the original proof. It disclosed a fresh and sufficient ground for condemnation upon which Sir William Scott did not permit the vessel to be impeached. The point suggested is that if under the ordinary circumstances of a prize case, while it still lies between claimants and captors, further proof is allowed with respect to such questions as property and destination which the interrogatories fully cover, much more should it be allowed in a novel situation like the present, for which the interrogatories really do not provide at all. The question of a new ground of condemnation is not involved, because condemnation has already passed and has been affirmed. No new ground of argument will be brought forward, because the argument was made below exactly as it will be made here. The point is that the essential facts relating to distribution were not fully or fairly brought out below.

The English cases in which further proof was allowed do not throw much light upon the particular point here. They are cases in the ordinary stage of proceedings to condemn and do not refer to distribution. Nevertheless, it may be worth while to note a few of the general rules announced.

One of the leading cases is that of the *Magnus* (1 C. Rob., 31), in which Sir William Scott believed that there were plain symptoms of fraud in addition to defects of evidence on the part of the claimants; and yet he hesitated to condemn and evidently would have allowed further proof a second time (after the case had gone to trial by "plea and proof") if there had been any means of obtaining further information (see p. 37).

The point in the *Adriana* (id., 313) was that further proof does not necessarily open the case to both parties. That suggestion of inequality does not exist in the present case, because in the motion in No. 445 on behalf of the officers and men of the *New York*, the prayer is that "all parties to this appeal have leave to adduce further proof to be taken under a commission issued by this court" (p. 13 of brief for *New York* in No. 445).

The *Johanna Emilie* (Spinks, 12, 25) merely refers to the *Magnus* and *Adriana* as authorities on further proof.

The *Otto and Olaf* (id., 257, 263) thus states the court's wide discretion as to the scope or method of further proof:

> It is quite in the power of the court to direct further proof generally or in any shape it thinks fit. On the present occasion it will direct further proof generally and will require to be satisfied, etc.

In the *Panaja Drapaniotisa* (id., 336, 34 1–43) Dr. Lushington states in brief form the general procedure

in prize and the rules as to further proof, and makes the particular point that in any case the court expects counsel to state what is expected to be proved before obtaining an order for further proof, and requires that the further proof offered shall be such as, if proved, will substantiate the claims made. The motions made here are within that test.

"The court is in no case concluded by the original evidence, but may order further proof on a doubt arising from any source or quarter." (Story on Principles, etc., of Prize Courts, p. 24.)

I respectfully suggest on behalf of the United States that the order for further proof may with justice and propriety be allowed under the circumstances of the present case.

HENRY M. HOYT,
Assistant Attorney-General.

O